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No. 01-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2001

ROBERT C. JUBELIRER AND MATTHEW J. RYAN, et al.
Appellants

v.

RICHARD VIETH, et al.
Appellees

ON CONDITIONAL CROSS-APPEAL
FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT ON CONDITIONAL CROSS-APPEAL

JOHN P. KRILL, JR.
(Counsel of Record)
LINDA J. SHOREY
JULIA M. GLENCER
KIRKPATRICK & LOCKHART LLP
240 NORTH THIRD STREET
HARRISBURG, PENNSYLVANIA 17101
(717) 231-4500
COUNSEL FOR APPELLANTS
JUBELIRER AND RYAN

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QUESTIONS PRESENTED

1. Should this Court reconsider and overrule its decision in *Davis v. Bandemer*, 478 U.S. 109 (1986), that a claim of partisan gerrymandering presents a justiciable political question?

2. In a state where voters frequently and massively engage in cross-over and split-ticket voting, can voters who prefer the candidates of one party be considered an "identifiable political group" for purposes of asserting a partisan gerrymandering claim under *Davis v. Bandemer*, 478 U.S. 109 (1986)?

PARTIES

The parties to this conditional cross-appeal are the Presiding Officers of the Pennsylvania General Assembly: Robert C. Jubelirer, Lieutenant Governor and President *Pro Tempore* of the Senate of the Commonwealth of Pennsylvania and Matthew J. Ryan, Speaker of the House of Representatives of the Commonwealth of Pennsylvania ("Presiding Officers") (Cross-Appellants herein and Defendants below), and Richard & Norma Jean Vieth and Susan Furey (Cross-Appellees herein and Plaintiffs below).[1]

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[1] The Governor of Pennsylvania Mark Schweiker, then-Secretary of the Commonwealth Kim Pizzingrilli and the Commissioner of the Bureau of Commissions, Elections and Legislation Richard Filling ("Executive Officers") were also named Defendants below.

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JURISDICTIONAL STATEMENT IN CONDITIONAL CROSS-APPEAL

INTRODUCTION

Presiding Officers, pursuant to Supreme Court Rule 18.4, file this Jurisdictional Statement in support of their conditional cross-appeal from the order at issue in Appeal No. 01-1873. Simultaneous with the filing of this Jurisdictional Statement, Presiding Officers, in their status as Appellees and pursuant to Supreme Court Rule 18.6, have filed a Motion to Dismiss or Affirm in response to the Jurisdictional Statement filed in Appeal No. 01-1873. This

cross-appeal has been brought in the interest of placing all disputed issues before this Court.[2]

OPINION BELOW

The February 22, 2002 opinion and order of the three-judge court below (Nygaard, C.J., Rambo and Yohn, D.J.) is reported at 188 F. Supp.2d 532, available electronically at 2002 U.S. Dist. LEXIS 3441, and contained in the Appendix filed in support of the Jurisdictional Statement in Appeal No. 01-1873 (pages 1a-33a). Citations herein are to 188 F. Supp.2d 532 and the filed Appendix.

JURISDICTION

It is asserted in the Jurisdictional Statement filed in Appeal No. 01-1873 that 28 U.S.C. §1253 provides the basis for this Court's appellate jurisdiction. In their Motion to Dismiss or Affirm, Presiding Officers dispute this basis for appellate jurisdiction and seek dismissal of Appeal No. 01-1873.

Should this Court, however, find jurisdiction appropriate in Appeal No. 01-1873, Presiding Officers ask

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[2] Three other appeals related to the litigation below are before this Court: No. 01-1817, No. 01-1823 and No. 01-1713. No. 01-1817 is a direct appeal by Presiding Officers from the April 8, 2002 order of the three-judge court enjoining the implementation of Act No. 2002-1 ("Act 1"). No. 01-1823 is a direct appeal by the Executive Officers from the same order. No. 01-1713 is a direct appeal by the Republican Caucus of the Pennsylvania House of Representatives from the February 22, 2002 order of a single judge of the three-judge court denying a motion to quash a subpoena issued to Carnegie Mellon University in connection with a contract between the Caucus and the University.

that jurisdiction over their conditional cross-appeal from the same order also be assumed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. XIV, §1 provides, in pertinent part: "No State shall ... deny to any persons within its jurisdiction the equal protection of the laws." U.S. CONST. art. I, §2, cl. 1, provides, in pertinent part, "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States ... ." U.S. CONST. art. I, §4, cl. 1 provides in pertinent part, "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof ... ."

STATEMENT OF THE CASE

A. Factual Background[3]

As a result of reapportionment following the 2000 Census, the Commonwealth of Pennsylvania lost two seats in Congress, going from 21 to 19. On January 7, 2002, a new state law ("Act 1") established district boundaries for the Commonwealth's 19 congressional seats.

When the Pennsylvania General Assembly recessed on December 13, 2001, different versions of the new redistricting plan (SB 1200) had been passed by the Pennsylvania Senate and the Pennsylvania House. SB 1200 was then considered by a Conference Committee, which reported a new version to the Senate and House. The final vote in the Senate on SB 1200 was 28-22; the final vote in the House was 132-59. Forty-two members of

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[3] This statement of factual background is derived from the allegations of the Amended Complaint, supplemented by facts of which judicial notice may be taken.

the House Democrat Caucus voted in favor of the bill, which would not have had a majority for passage without such bi-partisan support.

Based on unofficial November 2001 voter registration data, there are 3,733,739 registered Democrats, 3,233,171 registered Republicans, 3,266 registered Green party members and 803,365 other registered voters in Pennsylvania. *See* Am. Compl. ¶25; App. at 124a; Unofficial Voter Registration Data Nov. 2001, PA Dept. of State (http://www.dos.state.pa.us/bcel/arc/elec_arc.html). Using these data, Democrats account for 48%, Republicans account for 41.6% and others account for 10.3% of the registered voters. No party has a majority.

In the 2000 general election, 11 Republicans and 10 Democrats were elected to Congress. Am. Compl. ¶15; App. at 120a. In the five statewide elections held in 2000, Republicans won 3 races (U.S. Senator, Attorney General and State Treasurer) and Democrats won 2 races (President and Auditor General). Am. Compl. ¶27; App. at 125a.[4]

The Democrat party is not a minor party in the Commonwealth. *See* Am. Compl. ¶25; App. at 124a. Registered Democrat voters do not vote in a cohesive manner; rather, they engage in much cross-over and split-ticket voting. *See* Am. Compl. ¶25 (disregarding voters registered with minor parties or as non-affiliated, Democrats have a 53.6% to 46.4% advantage as between registered Democrat and Republican voters); App. at 124a. In five statewide races in 2000, only the Democrat

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[4] In Am. Compl. ¶27, other than for President, Plaintiffs allege the percent of the vote won by Republican and Democrat candidates based only on the totals for those two parties' candidates: U.S. Senator (53.5% R, 46.5% D); Attorney General (55.6%R, 44.4% D); Auditor General (41.3% R, 58.7% D); State Treasurer (51.1% R, 48.9% D). App. at 125a. These figures exclude votes for other candidates.

candidate for Auditor General received at least 53.6% of the vote. In the other four races, the largest percentage of Democrat votes (50.6%) was received by the Democrat candidate for President, while Democrat candidates for Attorney General, State Treasurer, and United States Senator all received less than 50% of the total votes cast for either a Democrat or Republican. As these data reveal, registered Democrats frequently and massively vote for Republican candidates; they are not a cohesive group.[5]

B. Procedural History

On January 11, 2002, Plaintiffs filed an Amended Complaint[6] for Declaratory and Injunctive Relief in the United States District Court for the Middle District of Pennsylvania against Presiding Officers, Executive Officers and the Commonwealth. App. at 116a-34a. Plaintiffs alleged that Act 1, *inter alia*, denied or abridged their right to vote for their Representative to the United States Congress in violation of U.S. CONST. art. I, §§2 and 4 and amend. XIV, §2 (Claim I) and denied them equal protection of the laws in violation of U.S. CONST. amend.

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[5] This trend continued in 2001 when Republicans won all 7 statewide elections for Supreme, Superior and Commonwealth Court. The Republican candidate for Supreme Court received 52.7% of all votes cast; the 3 Republican candidates for Superior Court received 55% of all votes cast; and the 3 Republican candidates for Commonwealth Court received 57% of all votes cast. *See* Unofficial 2001 Municipal Election Results (Supreme, Superior & Commonwealth Courts), PA Dept. of State (http://web.dos.state.pa.us/elections/elec_results/dsf/elec_menu.cgi?eyear=2001&etype=M).

[6] The initial complaint, filed December 27, 2001, challenged the 1992 congressional districting plan as unconstitutional in light of the 2000 Census data.

XIV, §1 (Claim II). App. at 131a.[7] Pursuant to 28 U.S.C. §2284(a), a three-judge court was convened.

On January 29, 2002, Presiding Officers and Executive Officers each filed motions to dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (6). Presiding Officers contended that Plaintiffs lacked standing and failed to state a claim on which relief could be granted on any of the claims of the Amended Complaint.

C. The Decision Below

On February 22, 2002, the three-judge court issued an opinion and order granting and denying Defendants' motions in part. 188 F. Supp.2d 532; App. at 1a-33a. The court dismissed all claims against the Commonwealth, under the doctrine of sovereign immunity, and dismissed Claims II-V for failure to state a claim. The court did not dismiss Claim I – the alleged violation of the one-person, one-vote principle.

In their motion to dismiss, Presiding Officers had objected to the justiciability of the partisan gerrymandering claim raised in Claim II. *See* 188 F. Supp.2d at 538; App. at 9a. Although the three-judge court considered itself bound by *Davis v. Bandemer*, 478 U.S. 109 (1986), to consider Claim II, it noted Presiding Officers' objection at the outset of its opinion. *See id.*

In addressing the motions to dismiss Claim II for failure to state a claim, the three-judge court first set forth the 3-prong *Bandemer* analysis: a plaintiff must "prove

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[7] Plaintiffs also alleged that Act 1 constituted an abridgment of the privileges and immunities of citizenship (Claim III) and denied or abridged their right to free association as guaranteed by amend. I (Claim IV). *See* Am. Compl ¶¶45-48; App. at 132a. Claim V alleged that the foregoing constitutional violations also violated 42 U.S.C. §1983.

both [1] intentional discrimination against an [2] identifiable political group and an [3] actual discriminatory effect on that group." 188 F. Supp.2d at 543 (quoting 478 U.S. at 127); App. at 20a. Although ultimately dismissing Claim II, the court ruled against Defendants on prongs one and two of the *Bandemer* analysis – discriminatory intent and "identifiable political group." With respect to prong two – "identifiable political group" – the court stated:

> Defendants contend that Plaintiffs have failed to allege facts demonstrating that Democrats in Pennsylvania vote as a block. However, Defendants do not point to any authority which would require such an allegation. The court has scoured the *Bandemer* decision and has found no such requirement. Instead, the court finds that *Bandemer* indicates that Plaintiffs must allege only that they are members of an identifiable political group whose geographic distribution is sufficiently ascertainable that it could have been used in drawing electoral district lines. Clearly, by alleging that they are Pennsylvania citizens who vote for Democrats, Plaintiffs have satisfied this requirement.

188 F. Supp.2d at 543-44; App. at 21a. The partisan gerrymandering claim was ultimately dismissed on the third prong of the analysis for failure to plead an "actual discriminatory effect."

D. Additional Proceedings

On March 11-12, 2002, the three-judge court heard evidence on the remaining claim. In a majority opinion issued April 8, 2002, Judges Nygaard and Rambo declared

Act 1 unconstitutional under the principle of one-person, one-vote and enjoined its implementation by Defendants.[8]

THE QUESTIONS ARE SUBSTANTIAL

A. Non-Justiciable Political Question

In *Bandemer*, this Court was asked whether a pure partisan gerrymandering claim presents a justiciable controversy or a non-justiciable political question. *See* 478 U.S. at 118. A majority of Justices, in an opinion delivered by Justice White, determined that such a claim is justiciable. Justice O'Connor, joined by then-Chief Justice Burger and then-Justice Rehnquist, concluded the opposite in an insightful concurrence, highlighting the flaws and dangerous presumptions undergirding the plurality opinion and predicting the inevitable failure of the analysis it set forth.

Time and experience have proven Justice O'Connor correct – "[t]he Equal Protection Clause does not supply judicially manageable standards for resolving purely political gerrymandering claims, and no group right to an equal share of political power was ever intended by the Framers of the Fourteenth Amendment." *Id.* at 147 (O'Connor, J., concurring in the judgment only). The Court

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[8] The propriety of the April 8, 2002 decision is the subject of Appeal Nos. 01-1817 and No. 01-1823. Following the invalidation of Act 1, the Pennsylvania General Assembly, on April 17, 2002, passed a bill containing a revised congressional redistricting plan. On April 18, 2002, the Governor signed the bill into law as Act No. 2002-34. Act 1 will still be used for this congressional election cycle but will be superseded by Act 34 for the 2004 congressional elections. On April 23, 2002, the three-judge court stayed the injunction imposed by the April 8, 2002 order. A request for a stay had also been submitted to Justice Souter of this Honorable Court but was withdrawn when the injunction was stayed by the issuing court.

should reconsider and overrule *Bandemer* and acknowledge that a partisan gerrymandering claim brought by a major political party presents a political question into which the judiciary cannot inquire.

A legal action presents a non-justiciable political question where there is a "'lack of judicially discoverable and manageable standards for resolving it,'" or where "'the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion is apparent.'" *Bandemer*, 478 U.S. at 148 (O'Connor, J., concurring in the judgment only) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Justice O'Connor explained in her *Bandemer* concurrence that allowing a major political group to bring a partisan gerrymandering claim forces the judiciary to favor "some form of rough proportional representation for all political groups," thus presupposing an initial policy determination forbidden to the judiciary. *Id.* at 145. Past precedent establishing the one-person, one-vote principle and adjudicating the rights of racial minority groups reveals that it is the individual's right to vote – not the right of the group – that is the appropriate subject of judicial protection. Extending such protections to major political groups overlooks the realities of the nation's two-party political system:

> Clearly, members of the Democratic and Republican Parties cannot claim that they are a discrete and insular group vulnerable to exclusion from the political process by some dominant group; these political parties *are* the dominant groups and the Court has offered no reason to believe that they are incapable of fending for themselves ... each major party presumably has ample weapons at its disposal to conduct the partisan struggle that often leads to a partisan apportionment, but also often leads to a bipartisan one.

Id. at 152 (emphasis in the original).

Justice O'Connor also explained why the analysis for partisan gerrymandering claims crafted by the plurality is itself evidence that a judicially-manageable standard is impossible in this context, as it will inevitably evolve towards "some loose form of proportionality." *Id.* at 155. She predicted that extending the rights protected by vote dilution analysis to groups would complicate judicial review by increasing the number of competing claims to equal group representation, *id.* at 156, and noted the additional layer of complexity added by the fact that individuals' voting patterns are not immutable. *See id.* For the judiciary to adjudicate a partisan gerrymandering claim under the *Bandemer* plurality's analysis, they must look for "some form of 'undue' disproportionality with respect to electoral success ... because otherwise they will find their decisions turning on imponderables such as whether the legislators of one party have fairly represented the voters of the other." *Id.* at 157.

Justice O'Connor also predicted the inevitable consequence of holding partisan gerrymandering justiciable and the havoc it would wreak upon the judiciary as it tried to negotiate the redistricting thicket:

> The step taken today is a momentous one, which if followed in the future can only lead to political instability and judicial malaise. *If members of the major political parties are protected by the Equal Protection Clause from dilution of their voting strength, then members of every identifiable group that possesses distinctive interests and tends to vote on the basis of those interests should be able to bring similar claims. Federal courts will have no alternative but to attempt to recreate the complex process of legislative apportionment in the context of adversary litigation* in order to reconcile the competing claims of political, religious, ethnic, racial, occupational, and socioeconomic groups.

> Even if there were some way of limiting such claims to organized political parties, *the fact remains that the losing party or the losing group of legislators in every reapportionment will now be invited to fight the battle anew in federal court.* Apportionment is so important to legislators and political parties that the burden of proof the plurality places on political gerrymandering plaintiffs is unlikely to deter the routine lodging of such complaints. Notwithstanding the plurality's threshold requirement of discriminatory effects, the Court's holding that political gerrymandering claims are justiciable has opened the door to pervasive and unwarranted judicial superintendence of the legislative task of apportionment. There is simply no clear stopping point to prevent the gradual evolution of a requirement of roughly proportional representation for every cohesive political group.

Id. at 147 (emphasis added).

This case is the incarnation of Justice O'Connor's fears. The 2002 congressional elections could well change the balance of power in the United States Congress, which currently is composed of 222 Republicans, 211 Democrats and 2 Independents. The redistricting plans to be put in place under the 2000 Census offered an opportunity to both major parties to attempt to influence state legislatures to draw districts that held greater promise of electing members of their party. If a party perceived that a state's enacted plan would change the balance of representatives in that state, as happened here, there was great incentive to litigate a partisan gerrymandering claim and attempt to get the federal court to draw the plan. Since federal courts are not permitted to undertake constitutional partisan gerrymandering, there was hope that an expected loss of seats could be prevented.

A situation very similar to that which occurred in Pennsylvania took place in Michigan. Plaintiffs in *O'Lear v. Miller*, 2002 U.S. Dist. LEXIS 9533 (E.D. Mich. No. 01-72584, issued May 24, 2002), challenged the newly-drawn congressional redistricting plan, alleging that use of the plan would result in the election of 10 Republicans to the 15 congressional seats allocated to Michigan after the 2000 census, while in the 2000 election under the 1992 court-drawn Michigan congressional redistricting plan, Democrats had won 9 of the 16 congressional seats Michigan had under been apportioned under the 1990 Census. The plaintiffs' primary allegation of injury, as here, was "disproportionate representation and its potential to continue for a prolonged period of time." *O'Lear*, 2002 U.S. Dist. LEXIS 9533 at *4.

The three-judge federal court in Michigan dismissed the partisan gerrymandering claim because plaintiffs, similar to here, had not "alleged that they have been shut out of the [political] process or that the challenged congressional redistricting plan is one from which they cannot recover or substantially improve upon." *O'Lear*, 2002 U.S. Dist. LEXIS 9533 at *11.[9]

In both Pennsylvania and Michigan, the plaintiffs wanted the federal courts to throw out a congressional redistricting plan enacted pursuant to that state's legislative process. To permit challenges to duly-enacted congressional redistricting legislation on the basis of partisan gerrymandering delegitimizes the political process that this Court has recognized time and again as the preferred method for redistricting. *See e.g., White v. Weiser*, 412 U.S. 783, 794-96 (1973) ("From the beginning,

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[9] The three-judge court gave the plaintiffs in *O'Lear* an opportunity to file an amended complaint. On June 5, 2002, the amended complaint was also dismissed for failure to state a claim. *See O'Lear v. Miller*, 2002 U.S. Dist. LEXIS 10010.

we have recognized that 'reapportionment is primarily a matter for legislative consideration and determination;' ... Districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task") (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)); *Wise v. Lipscomb*, 437 U.S. 535, 539-540 (1978) (noting that "[t]he Court has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt"); *Growe v. Emison*, 507 U.S. 25, 34 (1993) ("'reapportionment is primarily the duty and responsibility of the State through its legislative or other body, rather than of a federal court.'") (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)).

B. Identifiable Political Group

The *Bandemer* plurality, despite setting forth the requirement that a plaintiff allege and prove the existence of an "identifiable political group" to support a partisan gerrymandering claim, did not address whether such had been established in that case and provided no guidance on how that fact would be determined in subsequent actions.[10] In the wake of *Bandemer*, lower courts addressing partisan gerrymandering claims have paid scant, if any, attention to the requirement of an "identifiable political group." The Court now has an opportunity to elucidate the meaning of that requirement, which the plurality in *Bandemer* saw fit to include in its constitutional analysis.[11]

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[10] The *Bandemer* plurality noted only "[t]hat the characteristics of the complaining [political] group are not immutable or that the group has not been subject to the same historical stigma [as racial groups] may be relevant to the manner in which the case is adjudicated, but these differences do not justify a refusal to entertain such a case." 478 U.S. at 125.

[11] Justice O'Connor urged that neither major political party should be allowed to bring a claim for partisan gerrymandering:

In defining an "identifiable political group," the Court should draw guidance from Justice Stevens' concurring opinion in *Mobile v. Bolden*, 446 U.S. 55 (1980). *Mobile* involved a challenge by Afro-American voters to the validity of the at-large election of the governing body of the city (a three-member commission). This Court reversed a decision of the Court of Appeals for the Fifth Circuit, which, among other things, had upheld a conclusion of the district court that the at-large election process violated U.S. CONST. amend XIV, §1. In his concurring opinion, Justice Stevens addressed the thorny problem of identifying an identifiable group of voters:

> ... In the line-drawing [i.e., districting or redistricting] process, racial, religious, ethnic, and economic gerrymanders are all species of political gerrymanders.
>
> From the standpoint of the groups of voters that are affected by the line-drawing process, it is also important to recognize that it is the group's interest in gaining or maintaining political power that is at

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> Clearly, members of the Democratic and Republican Parties cannot claim that they are a discrete and insular group vulnerable to exclusion from the political process by some dominant group: these political parties *are* the dominant groups, and the Court has offered no reason to believe that they are incapable of fending for themselves through the political process.

478 U.S. at 152 (O'Connor, J., concurring in the judgment only) (emphasis in the original). One commentator suggests that "the cause of action the plurality is contemplating [in *Bandemer*] is not about Democrats and Republicans under normal conditions. It is about a political group suffering pervasive discrimination in the political process." Daniel Hays Lowenstein, "Bandemer's Gap: Gerrymandering and Equal Protection," POLITICAL GERRYMANDERING AND THE COURTS (Bernard Grofman, ed. 1990) at 83.

> stake. The mere fact that a number of citizens share a common ethnic, racial, or religious background does not create the need for protection against gerrymandering. *It is only when their common interests are strong enough to be manifested in political action that the need arises. For the political strength of a group is not a function of its ethnic, racial, or religious composition; rather it is a function of numbers – specifically the number of persons who will vote in the same way.*

Id. at 88 (Stevens, J., concurring) (emphasis added). *See also Karcher v. Daggett*, 462 U.S. 725, 754 (1983) (Stevens, J. concurring) ("As a threshold matter, plaintiffs must show that they are members of an identifiable political group whose voting strength has been diluted. They must first prove that they belong to a politically salient class ... .")

To constitute a "politically identifiable group," a group must be one whose members vote the same, i.e., a cohesive group. As one writer has suggested:

> In political gerrymandering, courts must find a correlation between Democrats and those who rigidly vote for Democratic candidates. ... To maintain a legitimate argument that 'Democrats' were unable to elect Democratic candidates, the plaintiff group must, with a least some degree of specificity, point out which persons were denied an effective vote. Merely asserting that some dynamic, amorphous group had its votes diluted cannot suffice. ... Those who occasionally cross over party lines to vote for non-Democrats widen the gap between plaintiff groups and their representative political group. Because individual preferences in voting have become so prevalent, few, if any, large political organizations today can

> assert that their members consistently vote along straight party lines.

Comment, *Davis v. Bandemer: Remedial Difficulties in Political Gerrymandering*, 37 EMORY L.J. 443, 479 (1988).

In this case, Plaintiffs' own allegations, which revealed widespread cross-over and split-ticket voting, should have been deemed fatal to their attempt to depict Democrat voters in Pennsylvania as an "identifiable political group." The three-judge court erred in ruling against Presiding Officers on this second prong of the *Bandemer* analysis.

CONCLUSION

This conditional cross-appeal presents this Court with an opportunity to review its earlier decision in *Davis v. Bandemer* deeming partisan gerrymandering claims justiciable and, should it opt to continue to recognize the justiciability of such claims, to clarify the scope of the second prong – "identifiable political group" – of the *Bandemer* analysis. If it does not dismiss the appeal in No. 01-1873 or summarily affirm the February 22, 2002 order of the three-judge court below, the Court should note probable jurisdiction and proceed to address the merits of the questions presented in this cross-appeal.

Respectfully submitted,

JOHN P. KRILL, JR.
(counsel of record)
LINDA J. SHOREY
JULIA M. GLENCER
COUNSEL FOR APPELLANTS
JUBELIRER AND RYAN